

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF JEFFERSON

3 HOOD CANAL SAND & GRAVEL LLC DBA
4 THORNDYKE RESOURCE, (Hood Canal)
5 OLYMPIC STEWARDSHIP FOUNDATION, J.
6 EUGENE FARR, WAYNE AND PEGGY
7 KING, ANNE BARTOW, BILL ELDRIDGE,
8 BUD AND VAL SCHINDLER, RONALD
9 HOLSMAN; (Olympic Stewardship)
10 CITIZENS' ALLIANCE FOR PROPERTY
11 RIGHTS JEFFERSON COUNTY, CITIZENS'
12 ALLIANCE FOR PROPERTY RIGHTS
13 LEGAL FUND, MATS MATS BAY TRUST,
14 JESSE A. STEWART REVOCABLE TRUST,
15 AND CRAIG DURGAN (Citizens' Alliance),

16
17 Petitioners,

18 v.

19 JEFFERSON COUNTY AND WASHINGTON
20 STATE DEPARTMENT OF ECOLOGY,

21 Respondents.

No.15-2-00087-9 (Hood Canal)
and
No. 15-2-00084-4 (Olympic Stewardship)
and
No. 15-2-00085-2 (Citizens' Alliance-)

(GMHB Case No. 14-2-0008c)

CERTIFICATE OF APPEALABILITY
(GRANTED)

22 **I. REQUEST FOR CERTIFICATE OF APPEALABILITY**

23 This matter came before the Growth Management Hearings Board (GMHB) on the
24 Application for Direct Review and Request for Certificate of Appealability filed by the
25 Washington State Department of Ecology on May 13, 2015 in regards to Hood Canal's,
26 Olympic Stewardship's, and Citizens' Alliance's appeals filed in Jefferson County Superior
27 Court.
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29 **II. PROCEDURAL BACKGROUND**

30 On December 16, 2013, the Jefferson County Board of Commissioners adopted
31 Ordinance 07-1216-13 to update the County's Shoreline Master Program (SMP). This was
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1 the first major update of Jefferson County's Shoreline Master Program since 1989. On
2 February 7, 2014, the Department of Ecology approved Jefferson County's SMP update. On
3 April 14, 15, and 18, 2014, the Board received three Petitions for Review filed by several
4 Petitioners¹. Petitioners challenged the SMP adopted by Jefferson County under Ordinance
5 07-1216-13 and the Department of Ecology's (Ecology) approval of that SMP. The Board
6 consolidated the petitions into Case No. 14-2-0008c entitled *Hood Canal Sand & Gravel,*
7 *LLC, et al. v. Jefferson County and Department of Ecology*. On March 16, 2014, the Board
8 issued its Final Decision and Order concluding Petitioners failed to demonstrate the
9 decisions of Jefferson County and Ecology violated chapters 90.58 RCW, 36.70A RCW or
10 chapter 173-26 WAC, and dismissed the case. On April 15, 2015, as authorized by RCW
11 36.70A.300(5), Petitioners filed three separate Petitions for Judicial Review of the FDO with
12 the Jefferson County Superior Court.
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14 In its May 13, 2015 Application for Direct Review,² Ecology argues the Hood Canal,
15 Olympic Stewardship, and Citizens' Alliance petitions filed in Jefferson County Superior
16 Court "raise the same issues for appeal as were considered by the Board"³ and those
17 issues are "key concepts under the Shoreline Management Act that are applicable to
18 Ecology's review and approval of other Shoreline Management Plans statewide."⁴ First,
19 citing the criteria in RCW 34.05.518(3)(b),⁵ Ecology explains that prompt resolution of the
20 Board's decision is necessary to provide predictability to other jurisdictions now reviewing
21 their shoreline master programs.⁶ Ecology enumerates several statewide SMP policy
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25 ¹ Petitioners are: Hood Canal Sand & Gravel, LLC, dba Thorndyke Resource (Hood Canal); the Olympic
26 Stewardship Foundation, J. Eugene Farr, Wayne and Peggy King, Anne Bartow, Bill Eldridge, Bud and Val
27 Schindler, and Ronald Holsman (collectively, OSF); and the Citizens' Alliance for Property Rights, Jefferson
28 County chapter, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart
Revocable Trust, and Craig Durgan (collectively, CAPR).

29 ² Ecology cites RCW 34.05.518(6) and WAC 242-03-970(2) as the authority by which it requests the Board to
act.

30 ³ Ecology's Application for Direct Review and Request for Certificate of Appealability at 4

31 ⁴ *Id.*

32 ⁵ RCW 34.05.518 Direct review by court of appeals. "(3) (b) An environmental board may issue a certificate of
appealability if it finds that delay in obtaining a final and prompt determination of the issues would be
detrimental to any party or the public interest and either: (i) Fundamental and urgent statewide or regional
issues are raised; or (ii) The proceeding is likely to have significant precedential value."

⁶ *Id.* at 5-6.

1 changes it would need to make should the Board's decision be overturned. For example,
2 Ecology's guidance documents would promptly need amending on such issues as requiring
3 economic impact statements for all SMPs; the requirement to update SMPs; application of
4 "No Net Loss" policy and buffers; and how to address non-conforming uses. The Court of
5 Appeals decision will determine whether Ecology must quickly amend its guidance
6 documents for other jurisdictions who are now reviewing their Shoreline Master Programs.
7 Second, Ecology explains the Petitioners' Superior Court appeals raise fundamental, urgent
8 issues of statewide importance and would have precedential value. Specifically, Ecology
9 argues that Petitioners raise issues implicating "bedrock principles of the Shoreline
10 Management Act (SMA) and SMA Guidelines that are common to other SMPs statewide."⁷
11 Ecology concludes its request for direct review meets criteria in RCW 34.05.518(3)(b) and
12 thus, its request should be granted.
13

14 Petitioners Hood Canal, Citizens' Alliance, and Olympic Stewardship oppose
15 Ecology's request for direct review.⁸ Hood Canal argues its petition "includes matters
16 outside the record created by the GMHB" such as constitutional issues not addressed in the
17 GMHB proceedings.⁹ Hood Canal further argues it intends to introduce "new evidence
18 related to the validity of the agency action" and that RCW 34.05.518(2) provides certification
19 may only be granted if the judicial review is limited to the record of the agency proceeding.¹⁰
20 Hood Canal states the issues it will raise are not new issues, but "rather issues Hood Canal
21 raised to preserve for judicial appeal, including "as applied" challenges in the future in the
22 context of individual permit applications."¹¹ Second, Hood Canal argues Ecology failed to
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26 ⁷ *Id* at 6.

27 ⁸ Hood Canal Sand and Gravel Opposition to Application for Direct Review and Request for Certificate of
28 Appealability (May 22, 2015); Citizens' Alliance Response to Respondents Application for Direct Review and
29 Its Request for Certificate of Appealability (May 21, 2015); Olympic Stewardship Opposition to Department of
30 Ecology's Application for Direct Review and Request for Certificate of Appealability (May 22, 2015).

31 ⁹ Hood Canal's Opposition to Application for Direct Review and Request for Certificate of Appealability (May
32 22, 2015) at 1-2.

¹⁰ *Id.* at 2. See also RCW 34.05.518 Direct review by court of appeals. "(2) For direct review upon certification
by the superior court, an application for direct review must be filed with the superior court within thirty days of
the filing of the petition for review in superior court. The superior court may certify a case for direct review only
if the judicial review is limited to the record of the agency proceeding and the court finds that. . . ."

¹¹ Hood Canal's Opposition at 3.

1 show that Hood Canal raised fundamental and statewide issues. Instead, Hood Canal's
2 issues before the Superior Court will focus on the Board's unlawful procedures and
3 decision-making processes.¹² As to the urgency of these matters, Hood Canal argues "local
4 jurisdiction updates and DOE (Ecology) review are a lengthy and ongoing process,
5 spanning several years, and each plan is revisited over time" and thus this matter is not
6 urgent.¹³

7
8 Olympic Stewardship opposes Ecology's application for direct review because these
9 Petitioners did not have an opportunity to create a record before the Board on constitutional
10 issues or on issues raised through discovery.¹⁴ Citing RCW 34.05.518(2), Olympic
11 Stewardship now wishes to raise the constitutional issues and issues from discovery in the
12 Superior Court.¹⁵ Similar to Hood Canal, Olympic Stewardship argues Ecology failed to
13 sufficiently argue why this case is of regional or statewide significance because each SMP
14 "is to be developed based on local circumstances" and Ecology will continue reviewing other
15 shoreline plans regardless of this appeal.¹⁶

16
17 Citizens' Alliance makes similar arguments to the other petitioners claiming the
18 Jefferson County SMP is a local plan "only applying within the boundaries of Jefferson
19 County."¹⁷ Further, these Petitioners are entitled to have their case heard and decided by a
20 locally-elected superior court judge . . . and . . . the Court of Appeals is a distant tribunal with
21 which they have little connection."¹⁸ Again, similar to the other Petitioners, Citizens' Alliance
22 argues finality and certainty for regulatory programs is not the same as for permits for
23 individual property. The Supreme Court cases cited by Ecology in support of its finality
24 argument are not appropriately applied to this case of regulatory programs years in the
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30 ¹² *Id.* at 4.

31 ¹³ *Id.* at 4.

32 ¹⁴ Olympic Stewardship Foundation Opposition to Application for Direct Review at 2-3

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 5-6.

¹⁷ Citizen Alliance Opposition at 2.

¹⁸ *Id.* at 3.

1 making.¹⁹ Finally, Citizens' Alliance repeats the need for discovery to supplement the record
2 and to allow it to present constitutional issues before Superior Court.²⁰

3 In reply, Ecology restates its contention that this case meets the RCW 34.05.518
4 (3)(b) criteria as the Court of Appeals decision will "be of significant precedential value and
5 delay does not serve the public interest."²¹ Further, Ecology points out Petitioners Hood
6 Canal and Olympic Stewardship cite the wrong section of the statute in making their
7 arguments.²² Subsection 2 of RCW 34.05.518 as cited by Olympic Stewardship only applies
8 to certification by Superior Court whereas Subsection 3 applies to certification by the
9 GMHB. Next, Ecology addresses the claim for discovery by explaining that "no ruling on
10 Petitioners' claim for discovery has been made" and the Superior Court may or may not
11 allow discovery. This is no basis for the Board to withhold its certificate of appealability if
12 other criteria are met.²³ Lastly, Ecology argues constitutional claims are not listed as a
13 ground for introducing new evidence.²⁴ Ecology requests the Board to issue a certificate to
14 quickly and finally resolve this matter.
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17 III. AUTHORITY AND ANALYSIS

18 The Administrative Procedure Act, RCW 34.05.518, sets forth the criteria and
19 procedures for Certificates of Appealability. RCW 34.05.518(3) identifies the Growth
20 Management Hearings Board as an "environmental board," and establishes the following
21 criteria for a certificate of appealability: (emphasis added)
22

23 (b) An environmental board may issue a certificate of appealability if it finds
24 that **delay in obtaining a final and prompt determination of the issues**
25 **would be detrimental to any party or the public interest** and **either:**

26 (i) Fundamental and urgent statewide or regional issues are raised; **or**

27 (ii) The proceeding is likely to have significant precedential value.
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30 ¹⁹ *Id.* at 4.

31 ²⁰ *Id.* at 5.

32 ²¹ Ecology's Reply in Support of Application for Direct Review (May 29, 2015) at 1-2.

²² *Id.* at 2.

²³ *Id.* at 4.

²⁴ *Id.* at 5.

1 RCW 34.05.518(4) requires a board to state in its certificate of appealability “which criteria it
2 applied [and] explain how that criteria was met.” This Board reviews the request for
3 certification in light of the criteria in RCW 34.05.518(3)(b).
4

5 **A. Detrimental Delay**

6 This is a threshold question as the Board may not issue a Certificate of Appealability
7 unless “delay in obtaining a final and prompt determination of the issues would be
8 detrimental to any party or the public interest.”²⁵ This case involves establishing how the
9 State will review and approve Shoreline Master Programs now being updated by local
10 jurisdictions throughout Washington. As Ecology states in its Application “every shoreline
11 jurisdiction in the state is required to adopt a comprehensive SMP update by the timetable
12 set by the Legislature in RCW 90.58.080(2);” only half have completed their update.²⁶ If the
13 Court proceedings delay the final decision and the decision changes Ecology’s current
14 procedures, then those jurisdictions now updating their SMPs will need to amend them
15 again shortly after adoption. Further, as Ecology argues in its Reply, the Superior Court
16 decision will “almost certainly be appealed by the losing party . . . thus, review by the
17 superior court simply delays the final outcome.”²⁷
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19 The Board finds the interests of the State and the public interest would be harmed
20 by delay because Court decisions could change policies used by Ecology to approve SMPs.
21 The possible need to amend those policies means subsequent delays for counties and
22 cities throughout the state now updating their SMPs. The Board finds that the public
23 interest is best served in deciding this particular matter on an expedited basis. RCW
24 36.70A.480 includes Shorelines of the State in the Growth Management Act goals and
25 further states that SMPs “shall be considered an element of the county or city’s
26 comprehensive plan.” (RCW 36.70A.480 Shorelines of the State) In addition, SMPs are
27 reviewed and adopted according RCW 90.58.080 which establishes a timetable for local
28 governments to amend their SMPs beginning in 2005 through 2014 and then again
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32 ²⁵ RCW 34.05.518(3)(b).

²⁶ Ecology’s Application at 5.

²⁷ Ecology’s Reply in Support of Application at 3.

1 beginning in 2019 through 2022. Half of the jurisdictions are still in the midst of the current
2 round of updates. The expressed intent of the Legislature was to have an orderly and
3 frequent update process. Delay in resolving the questions with respect to Jefferson
4 County's SMP may result in many jurisdictions being unable to meet the legislative
5 timetables.
6

7 **Conclusion:** For the reasons stated above, the Board finds delay in this matter would be
8 detrimental to the interests of Respondent Ecology and to the public interest as represented
9 by cities and counties throughout the State.
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11 **B. Fundamental and Urgent Statewide or Regional Issues Raised**

12 As stated supra, every jurisdiction in the state is required to adopt a comprehensive
13 SMP update by the timetable set by the Legislature in RCW 90.58.080(2) and only half have
14 completed their update.²⁸ And, as Ecology observes, the Petitioners have raised many
15 fundamental SMA issues, including: whether a jurisdiction is required to perform an
16 economic impact analysis, whether or not jurisdictions are in fact mandated to perform the
17 current SMA updates, application of the no net loss policy, and issues addressing non-
18 conforming uses. These are all issues broader in scope than merely a single county,
19 Jefferson. They are questions that apply to every jurisdiction required to adopt an SMP. The
20 Board sees fundamental and urgent statewide questions to be resolved by the Court of
21 Appeals regarding the nature of Jefferson County's SMP.
22

23 **Conclusion:** For the reason stated above, the Board finds this matter raises issues of
24 fundamental and urgent statewide importance.
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26 **C. Significant Precedential Value**

27 RCW 34.05.518 (3)(b) requires the Board to find that the matter *either* presents a
28 fundamental regional or statewide issue *or* is likely to have significant precedential value.
29 Having found that the issue presented is of fundamental statewide importance, the Board
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²⁸ Ecology's Application at 5.

1 need not address the precedential value of this matter. However, pursuant to RCW
2 34.05.518(4), the Board elects to address the precedential nature of this case.

3 Appellate rulings on GMA or SMA questions provide precedential guidance to other
4 local governments. The question of the SMA review and approval process by Ecology has
5 not been addressed by the Courts. As Ecology contends these Petitions implicate key
6 concepts upon which Ecology relies on for its review and approval of SMPs throughout the
7 state.²⁹

8
9 Resolution by the appellate courts of the question of SMP review is likely to have significant
10 precedential value as it affects county and city decisions on current and upcoming SMP
11 updates. The Board concurs.

12
13 **Conclusion:** For the reason stated above, the Board finds judicial determination of this
14 matter is likely to have significant precedential value.

15 16 IV. ORDER

17 Having reviewed the application for Certificate of Appealability, the relevant
18 provisions of the Administrative Procedures Act, in particular RCW 34.05.518(3)(b), and the
19 facts of this matter, the Board finds that delay in obtaining a final and prompt determination
20 of the issues will be detrimental to the Department of Ecology, Jefferson County and to the
21 public interest. The Board further finds that a fundamental and urgent issue of statewide
22 importance is raised and that a judicial determination is likely to have significant
23 precedential value.

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25 Having found the criteria of RCW 34.05.518(3) are satisfied, the Board issues a
26 Certificate of Appealability for direct review in Jefferson County Superior Court Case No.15-
27 2-00087-9 (Hood Canal), Case No. 15-2-00084-4 (Olympic Stewardship), and No. 15-2-
28 00085-2 (Citizens' Alliance).

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²⁹ Ecology's Application for Direct Review at 7.

1 Entered this 5th day of June, 2015.

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3 _____
4 Nina Carter, Board Member

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6 _____
7 Will Roehl, Board Member

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9 _____
10 Cheryl Pflug, Board Member